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IN THE

Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.; AND JACK C. PHILLIPS,

PETITIONERS

v.

COLORADO CIVIL RIGHTS COMMISSION; CHARLIE CRAIG; AND DAVID MULLINS,

RESPONDENTS

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT PETITIONER

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To the Honorable Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37.1 and .2 and other applicable Rules of this Court, the Foundation for Moral Law (the Foundation) hereby respectfully moves this Court for leave to file the accompanying brief as amicus curiae on behalf of Petitioner urging this Court to grant a writ of certiorari in this case. Petitioner has consented to this brief but Respondents have not.

In support of its motion, the Foundation submits the following:

1. The Foundation is a non-profit corporation based in Montgomery, Alabama, dedicated to the strict interpretation of the United States Constitution as intended by its Framers and to the free exercise of religion. The Foundation's attorneys specialize in constitutional law and have insights that may be of help to this Court in resolving this issue of whether to grant certiorari.

2. The decision of the Colorado Court of Appeals below is in conflict with decisions of this Court and other courts.

3. The Foundation is aware of many persons and businesses across this nation who are being forced to participate in same-sex weddings by baking, photography, or other services. In so doing they are forced to either violate their sincerely-held religious beliefs, close down their businesses, issue disclaimers (which is sometimes impossible and which itself constitutes compelled speech). Individuals, businesses, commissions, government officials, legislators, and lower courts are divided and uncertain and looking to this Court to resolve this crucial issue that affects the faiths and livelihoods of so many people.

WHEREFORE, for the reasons stated, the Foundation for Moral Law respectfully requests that this Court grant it leave to file the accompanying brief amicus curiae.

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*[1]

Amicus Curiae Foundation for Moral Law[1] (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the United States Constitution as interpreted strictly according to the intent of its Framers. Accordingly, the Foundation believes the separation of powers set forth in Article I, II and III of the Constitution should be strictly followed, because abdications of constitutional authority by one branch leave a vacuum in which other branches are likely to step, and usurpations by one branch of authority delegated by the Constitution to another branch, erode the strict limitations on power which the Framers imposed to prevent tyranny and protect liberty.

The Foundation believes marriage and the family are the most fundamental order of society, and

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[1] Pursuant to this Court's rule 37.3, petitioners have consented to the filing of this *amicus* brief and respondents have not been reached thus far. Further, pursuant to Rule 37.6, these *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no party and no counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

that freedom of religion and freedom of expression are among the most fundamental rights guaranteed by the First Amendment to the United States Constitution. As such, the Foundation believes these rights should be accorded strict scrutiny, especially when asserted in tandem as a hybrid right. These most fundamental rights should not be abridged to accommodate a claimed state interest in protecting same-sex marriage which is not explicitly granted by any provision of the Constitution and which was first recognized by this Court less than two years ago.

Furthermore, the Foundation believes the courts and the State of Colorado must not communicate a "message of exclusion" to those members of society whose sincere religious beliefs prohibit participation in same-sex marriage.

SUMMARY OF ARGUMENT

"At common law, only innkeepers and common carriers had an obligation to serve all comers regardless of race; other businesses generally had the right, as property owners, to exclude anyone for any reason."[2] The general common law rule that, "absent some reasonable ground...innkeepers and common carries [are] under a duty to furnish accommodations to all persons" has undergone an evolution in modern times.[3] Today, both state and federal statutory laws cover more protected classes and extend the prohibition to a much larger realm of society.[4] While anti-discrimination statutes have likely done some good in eliminating animus and providing equality,

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[2] *See*, Lauren J. Rosenblum, *Equal Access or Free Speech: The Constitutionality of Public Accommodations*, 72 N.Y.U.L. Rev. 1243 (quoting Earl M. Maltz, *Separate But Equal and the Law of Common Carriers in the Era of the Fourteenth Amendment*, 17 Rutgers L.J. 553, 553-54 (1986), as it discusses obligations of common carriers); *see also* Alfred Avins, *What Is a Place of "Public" Accommodation?*, 52 Marq. L. Rev. 1, 2-7 (1968) ("discussing common law rule that innkeepers and common carriers could not exclude, while others were legally permitted to do so.")

[3] *See James v. Marinship Corp*, 155 P.2d 329 (Cal. 1944) (quoting 52 L.R.A. (N.Y.) 740; 43 Am. Jur. 586-87)

[4] *See generally* 42 U.S.C.A. § 2000; Col. R.S.A. § 24-34-601(2).

these statutes, as applied to a number of Americans, raise the possibility of unjust government censorship.

"A right of access created by public accommodations law directly opposes a right to exclude that may arise from a variety of constitutional or 'natural law' sources."[5] Notwithstanding this axiom "[a]ntidiscrimination laws have important purposes that go beyond expressing government values: they ensure that services are freely available in the market, and they protect individuals from humiliation and dignity harm."[6] Still, as one scholar has observed, "[t]he rise of equal access rights nevertheless does not mandate the fall of individual liberties."[7] Consequently, it appears that this dichotomy between two classes of liberties is in serious need of direction. In fact, the free speech rights that come into conflict with anti-discrimination statutes are exactly the kind of rights this Court has sought to protect in its precedent.[8] In the Court's own words,

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[5] Pamela Griffin, *Exclusion and Access in Public Accommodations: First Amendment Limitations Upon State Law*, 16 Pac. L.J. 1047 (1985).

[6] *See id.* (quoting *Daniel v. Paul*, 395 U.S. 298 (1969) in that the purpose of Title II of the Civil Rights Act of 1964 was, "to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public.")

[7] Pamela Griffin, supra at 1048.

[8] *See generally Whitney v. California*, 274 U.S.357, 375 (1927).

> [I]t is hazardous to discourage thought, hope and imagination. . . that fear breeds repression; that repression breeds hate . . . hate menaces stable government. . . that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies.[9]

Therefore, the current case illustrates this compelling dilemma and impresses the need for Supreme Court intervention.

ARGUMENT

The Colorado Court of Appeals (CCA) ruling in this case conflicts with basic Supreme Court jurisprudence regarding the right to expression, thereby creating a conflict appropriate for this Court to resolve.

I. The Colorado Court of Appeals (CCA) fundamentally erred in elevating a right not found in the Constitution (same-sex marriage) above the most basic rights expressly set forth in the Constitution.

Professor Leo Pfeffer called the Free Exercise Clause the "favored child" of the First Amendment. (Leo Pfeffer, *Church, State and Freedom* (Boston: Beacon Press, 1953) p. 74. Professor Lawrence Tribe wrote that the First Amendment religion clauses embody two basic principles: separation (the Establishment Clause) and voluntarism (the Free Exercise Clause). "Of the two principles," he said, "voluntarism may be the more fundamental," and therefore, "the free exercise principle should be dominant in any conflict with the anti-establishment

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[9] *Id.*

principle." (Lawrence H. Tribe, *American Constitutional Law* Second Ed. (Mineola, New York: Foundation Press, 1978), (cf. 2nd Ed. sec. 14-3, p. 1160). Voluntarism is central to the case at hand, for the CCA's ruling has the effect of compelling Masterpiece cake shop to act involuntarily in contravention of its most basic beliefs. This is a violation of the right to free exercise at its very core.

Even if we could agree that the courts are empowered to recognize rights not mentioned in the Constitution (a contention that, for purposes of this pleading, we do not dispute), that certainly does not lead to the conclusion that an unmentioned right to engage in same-sex marriage takes precedence over the right of free exercise of religion which is set forth as a foremost if not the foremost right of all rights guaranteed by the Constitution. That is exactly what the CCA has done here—elevated the right of a same-sex couple to marry and compel a private party to provide a work of art to celebrate that union over the constitutionally enumerated right of free exercise of religion and free speech which forbids government compulsion to act in a way that contrasts with one's sincerely held religious beliefs.

II. Cert. is appropriate because the CCA ruling is in conflict with this Court's jurisprudence regarding hybrid rights in accord with the *Boerne v. Flores* standard.

In *Employment Div., Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Court held that strict scrutiny need not be applied to laws of general application that incidentally infringe the free exercise of religion. At the urging of a coalition of religious and constitutional organizations spanning the

conservative and liberal wings of the political spectrum, Congress enacted and President Clinton signed the Religious Freedom Restoration Act (RFFA) to restore the strict scrutiny test to all enactments that substantially burden the free exercise of religion.

In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court invalidated RFRA as applied to the states, saying the Act exceeded the powers of Congress under the Fourteenth Amendment. Summarizing the *Smith* decision, the *Boerne* Court noted that

> The only instances where a neutral, generally applicable law had failed to pass constitutional muster, the *Smith* Court noted, were cases in which other constitutional protections were at stake. *Id.*, at 881-82. In *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972), for example, we invalidated Wisconsin's mandatory school-attendance law as applied to Amish parents who refused on religious grounds to send their children to school. That case implicated not only the right to the free exercise of religion but also the right of parents to control their children's education.

Boerne at 513-14. This remains the clear state of the law today: Strict scrutiny applies to cases in which free exercise rights are asserted in conjunction with other constitutional protections. In this case, the Masterpiece appellants assert violations of their free exercise rights and their free speech rights. The Colorado Court of Appeals decision is therefore at odds with the *Smith* and *Boerne* decisions of this Court. Such a conflict creates a case that is ideal for the review of the United States Supreme Court in order to resolve the conflict.

Furthermore, this Court in *Obergefell v. Hodges*, ___ U.S. ___, 135 S.Ct. 2584, 2607 (2015), recognized that free exercise rights of individuals objecting to same sex marriage on religious grounds were a central issue:

> ...it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons.[10]

Thus, to dismiss Masterpiece's moral objection to artfully designing a cake for a same sex wedding celebration is actually contrary to the very case that supposedly granted same-sex couples the right to marry (albeit, after the event that gave rise to this

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[10] During the oral arguments before the Supreme Court on *Obergefell*, counsel gave differing answers on the question of religious freedom protection for those who object to same-sex marriage. Petitioners' Counsel Mary L. Bonauto insisted on p. 23 that those free exercise protections will continue to apply (at least to clergy) (p. 23), but U.S. Solicitor General Donald B. Verrilli, Jr., was not so sure, saying "It is – it is going to be an issue." (p.38). *See* https://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_7148.pdf

litigation in the first place). If those who adhere to religious doctrines may continue to advocate with the utmost conviction that same-sex marriage should not be condoned, then Masterpiece must have the freedom to reject an order to produce a cake for a same-sex wedding. The act of producing a central ceremonial symbol for an event that violates that sincerely held religious beliefs of the artist implies that the producer condones the event, even though the CCA disagrees. To agree to serve a same-sex couple in any other capacity while refusing to serve them in the single event of a wedding is nothing more than the advocacy of a sincerely held religious belief. The granting of cert in this case is appropriate in part because the CCA's ruling conflicts with Justice Kennedy's own words in *Obergefell* that those with religious objections to same-sex marriage would be free to advocate that same-sex marriage should not be condoned.

III. Masterpiece believes that being compelled to act in violation of its religious beliefs creates a substantial burden, and the Colorado Court of Appeals should have given deference to that belief.

The CCA said that forcing Masterpiece to furnish a cake for a same-sex wedding is not a major infringement on free exercise. However, that conclusion is at odds with clear precedent from this Court. According to *Thomas v. Review Board*, courts should not dissect religious beliefs. In *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), a Jehovah's Witness, Thomas, worked for Blaw-Knox fabricating sheet metal. After that division of the company closed,

Thomas was transferred to a division that worked on tank turrets, at which time his employment was terminated because he refused to build tank turrets as that practice would violate his pacifist religious beliefs. He filed for unemployment compensation, and his claim was denied because his refusal to work constituted misconduct. Thomas argued that this denial of unemployment benefits on this basis that his refusal to build tank turrets constituted "misconduct" violated the First Amendment because his alleged "misconduct" was based upon his pacifist religious beliefs. (cite at 710)

Not unlike the present matter, the state courts denied relief to Thomas. There the Indiana Supreme Court denied his free exercise claim, stating that the basis for his beliefs was unclear but more a personal philosophical choice than a religious conviction: "A personal philosophical choice, rather than a religious choice, does not rise to the level of a first amendment claim." *Id.* at 713. Upon review, in an 8-1 decision, the U.S. Supreme Court reversed the Indiana Supreme Court. The Court held at 714,

> The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task, as the division in the Indiana Supreme Court attests. However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

The lower court noted that Thomas was willing to work at the foundry even though the foundry

produced steel that would ultimately be used to make weapons. But as this Court observed at 714-15,

> ...[T]he Indiana court seems to have placed considerable reliance on the facts that *Thomas* was "struggling" with his beliefs, and that he was not able to "articulate" his belief precisely. It noted, for example, that *Thomas* admitted before the referee that he would not object toworking for United States Steel or Inland Steel . . . produc[ing] the raw product necessary for the production of any kind of tank . . . [because I] would not be a direct party to whoever they shipped it to [and] would not be . . . chargeable in . . . conscience. . . .

271 Ind. at ___, 391 N.E.2d at 1131.

The Court found this position inconsistent with Thomas' stated opposition to participation in the production of armaments. But Thomas' statements reveal no more than that he found work in the roll foundry sufficiently insulated from producing weapons of war. In the same way, the undisputed facts of this case suggest that Masterpiece Cakeshop readily agreed that it would be acceptable to serve the homosexual community and the community at large in nearly any other circumstance, just not in celebration of a homosexual wedding. In the same way that Thomas drew a line, Masterpiece has drawn a line, and it is not for the Colorado Court of Appeals or any court to say that the line he drew was an unreasonable one.

Masterpiece claims its objection to providing a wedding cake for a same-sex wedding is religious. The CCAI does not deny that their objection is both religious and sincere. However, the nature of a

religious belief, and the degree to which a law burdens that belief, cannot be neatly separated. Masterpiece bases its beliefs and practices on the commands of God as revealed through the Holy Bible. The owner of Masterpiece, the person who actually provides the cakes, believes he would sin against God if he were to provide a cake for a homosexual wedding. It is up to the owner of Masterpiece Cakeshop, the artist himself, not the Court, to determine whether baking a cake for a same-sex wedding is a sin, and if so, how serious a sin.

When the CCA tells Masterpiece that this burden is cured by a sign on the door denying any endorsement of certain viewpoints, the court is essentially telling Masterpiece what it believes. Basically, the court is telling the Masterpiece that baking a cake for a same-sex wedding would not be a serious sin, and that its belief that it is a serious sin is objectively false, as well as less important than the supposed fundamental right of two members of the same sex to marry when those people could easily retain the services of another bakery.

This comes close to telling Masterpiece what doctrines and practices are central to its faith and what doctrines and practices are not central. This involves a detailed analysis of Masterpiece's religious doctrine which the Colorado Court of Appeals has neither the competence nor the jurisdiction to undertake.

The centrality of a doctrine or practice may vary from one denomination to another, and may even vary among individuals within the same denomination. Like the example of baptism given earlier, the significance of Communion would vary among denominations and individuals. Roman

Catholics consider the bread and wine of Communion to be the transubstantiated Body and Blood of Jesus Christ. Lutherans consider Communion to be a means of grace involving the "real presence" of Christ in the sacrament. Others such as Baptists generally regard Communion to be only an ordinance and the bread and wine (or grape juice) to be only symbols. Analyzing these doctrines within the broader concept of faith might lead a court to consider Communion a "central" doctrine or practice for Catholics, possibly central for Lutherans, and not central for Baptists. But as this Court recognized in *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989), "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."[11]

And the question of centrality is closely related to the substantiality of the burden. Suppose the government allowed churches to serve Communion but prohibited (or required) the use of wine instead of grape juice. Would that be a substantial burden? To answer that question, a court would have to analyze the nature of the practice of Communion, both generally and in that denomination, the history of that practice, the doctrinal reasons for the practice,

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[11] The Tenth Circuit cited this case and further quoted this Court as saying "We do, however, have doubts whether the alleged burden imposed by the deduction disallowance on the Scientologists' practices is a substantial one." *Id.* However, the Tenth Circuit failed to note that this Court did not decide the substantiality issue because it based its decision on other considerations.

and the consequences (in the view of church adherents) of violating that practice. That kind of study is precisely the "excessive entanglement" this Court has said government must avoid, *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The case of *United States v. Seeger*, 380 U.S. 163 (1965), is also instructive, even though the issue was the meaning of "religious" under Sec. 6(j) of the Universal Military Training and Service Act rather than in the First Amendment. The statute provided an exemption from military service for those who were opposed to military service on the basis of "religious training and belief." The Selective Service denied Seeger's claim for conscientious objector status, contending that his beliefs were not religious because the Act spoke of "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code." Seeger' and his co-plaintiffs did not claim to believe in a "Supreme Being" although he did believe in a "Supreme Reality." But this Court stated at 165-66,

> We have concluded that Congress, in using the expression "Supreme Being," rather than the designation "God," was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that, under this construction, the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the

> exemption. Where such beliefs have parallel positions in the lives of their respective holders, we cannot say that one is "in a relation to a Supreme Being" and the other is not.

Seeger demonstrates an inclination of this Court to defer substantially to a person or a religious group in determining the nature of their religious beliefs. The conscientious objection that was provided to Seeger because of his objection to killing in warfare should also be provided to the Masterpiece because of what it perceives to be the endorsement or condoning of a sinful practice.

The CCA has no constitutional authority to tell Masterpiece what they believe, what aspects of their beliefs are central, what constitutes a burden on their beliefs, or how substantial those burdens may be. Unless there is evidence that Masterpiece is insincere -- and there is none -- its claim that baking a cake for a same-sex wedding constitutes a substantial burden must be given very considerable deference. To paraphrase what this Court said in *Thomas*, there could be a claim of substantial burden that is so bizarre, so obviously contrived, and so obviously insincere, as not to be entitled to First Amendment protection; but that is not the case here.

Telling the Masterpiece petitioners what does and does not constitute a substantial burden on their belief is comparable to telling the Masterpiece petitioners what they believe. In fact, the very nature of what constitutes a substantial burden is highly individualized. One person who holds religious objections to same-sex marriage may see no conflict between his beliefs and baking a cake for a same-sex wedding. Another equally sincere objector might not object to baking a cake so long as he is not

required to attend the wedding and confirm that the cake is his work. Another may not object to baking the cake so long has he is not required put the final individualized trimmings on the cake that make it unique to the occasion. Still another might find all of these scenarios offensive, and others might go still further. The CCA has neither the jurisdiction nor the competence to tell the Masterpiece petitioners what does and does not constitute a substantial burden upon their religious beliefs. When the CCA attempts to dissect the Masterpiece petitioners' beliefs and decide what is and is not a substantial burden, the CCA attempts to do precisely what this Court in *Thomas* said lower courts are not permitted to do. The CCA decision is therefore at odds with *Thomas* and similar decisions of this Court.

A. The Colorado Court of Appeals' reliance on *Pruneyard Shopping Center* is entirely misplaced.

Pruneyard, because of a special provision of the California Constitution, was required to allow a demonstration to take place on its property. But Pruneyard was not required to do anything or make anything for the demonstration, unlike Masterpiece which is required to bake a cake.

Pruneyard Shopping Center v. Robins, 447 U.S. 749 (1980), involves a very different situation. Pruneyard is a privately-owned shopping center whose owners objected to a demonstration on their premises. Normally, according to *Hudgens v. NLRB*, 424 U.S. 507 (1976), and other cases, a shopping center does not have to allow expressive activity on its premises. However, Pruneyard is located in California, and the case was an exception to the general rule because of a provision of the California Constitution which the

California Supreme Court has interpreted to allow such expression on private shopping center premises. Obviously that California provision does not apply to Colorado.

Pruneyard is also different from the case at hand for another reason: Pruneyard and its owners were not asked or required to join in the expressive activity, create anything to promote it, or do anything to further it. It simply took place on their property, nothing more. By contrast, in the case at hand Masterpiece is required to actively prepare a cake and artistically decorate it with a theme that promotes same-sex marriage.

B. The Colorado Court of Appeals mischaracterized Masterpieces' burden.

The CCA says other bakeries' refusal to bake anti-gay cakes was permissible because those messages were "offensive."[12]

According to *Barnette* and other cases, the government has no business determining what is orthodox and therefore no business determining what is offensive. While those bakeries certainly have a right to refuse to bake a cake with a message they consider offensive, the government may not determine that is offensive and use that as a basis for distinguishing those instances from Masterpiece.

Barnette at 642:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,

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[12] *See* Petitioner's Pet. for Cert. Appendix at 20a; 24a.

> or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Just as government cannot prescribe what is orthodox, so government cannot prescribe what is offensive, except for certain categories of speech such as obscenity, and there is no suggestion that the cake messages referred to in these cases fit into any of those narrow categories that would place them outside the protection of the First Amendment. Nor is it of any significance that the Masterpiece petitioners are motivated by Christian conviction while the motives of those who presented cake requests to the bakeries above may not have been Christian or even religious. Those persons had a message they wanted the cakes to convey, and there is no basis for distinguishing the refusal of those bakeries to fulfill their requests from the refusal of the Masterpiece petitioners to fulfill a request for a cake honoring same-sex marriage.

The CCA suggested that a reasonable observer would understand that Masterpiece's compliance is not a reflection of its own beliefs, and stood to use this assertion as a basis for its holding.[13] However, the CCA misapplied the appropriate test for compelled speech from *Wooley v. Maynard* and *W.V. v. Barnette,* no reasonable observer test there.

Moreover, the CCA's opinion in this case seemingly ignores the First Amendment inquiries that this Court set forth in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557

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[13] Petitioner's Pet. for Cert. Appendix at 31a, 33a.

(1995). Holding against the application of Massachusetts' public accommodation statute, the Supreme Court in that case brought forth a series of free speech questions relevant to compelled speech issues. First, the Supreme Court found the St. Patrick's Day Parade was an expressive event because the march involved more than merely making a trip, but "a public dram[a] of social relations."[14] The Court also noted that if the parade were to lack signs or verbal speech, it would nonetheless be a protected expressive act because the march itself would be a form of symbolic speech.[15] Most importantly, the Court also took note of a speaker's autonomy to convey a message which he or she chooses.[16] Thus, the Supreme Court concluded, the leaders of an organized march carrying a "particularized message" could not be compelled by the state to include whomever sought to take part in the parade.[17] On the contrary, the Court stated, "this use of the State's power" to force a private speaker to include speech which he or she may or may not agree with, "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[18] Furthermore, the Court concluded that, "like a composer, the Council selects the expressive

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[14] *Hurley* at 568 (quoting S. Davis, *Parades and Power: Street Theatre in Nineteenth-Century Philadelphia*, 6 (1968)).

[15] *Hurley, supra* at 569.

[16] *See id* at 569.

[17] *See id* at 570.

[18] *Id* at 573.

units of the parade from potential participants."[19] And these choices of what messages to include and which to exclude "is enough to invoke [the council's] right as a private speaker to shape its expression by speaking on one subject while remaining silent on another."[20]

Similar to this cases' procedure below, in *Hurley* the application of the Massachusetts anti-discrimination statute barring discriminatory practices by public accommodations on the basis of one's sexual orientation had been upheld by state courts.[21] However, this Court noted that using the State of Massachusetts's approach, a protected individual under the anti-discrimination statue could infiltrate any expressive speech and shape it according to his own wishes.[22] At oral argument the Colorado civil rights commission stated that objections to a patron's message would not imply to the "reasonable observer" that Mr. Phillips had endorsed a customer's viewpoint.[23] *Hurley* however, did not leave room for the CCA to manufacture this rule. Instead, in *Hurley* this Court noted that even in the event that a private actor is a passive conduit of other's speech, that actor can make decisions limiting the conduct to be expressed.[24]

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[19] *Id* at 574.

[20] *Id.*

[21] *See id* at 573.

[22] *See id.* (and amicus sees the same issue with application of Colorado's approach).

[23] *See also* Petitioner's Pet. for Cert. at 34a.

[24] *See generally id* at 575.

This point re-made with respect to business owners in *Marsh v. State of Alabama*. There, the Court succeeded in careful line-drawing between a business owner's expressive rights and his customer's.[25] For instance, in *Marsh*, the Supreme Court held that a private business could control what messages were being expressed on the business' property.[26]

Finally, as noted above, from the First Amendment context *Hurley* asked the important question that the CCA seems to largely overlook: whether or not the conduct was expressive. In *Hurley* the Court determined the parade to be expressive indeed. The matter facing Mr. Phillips at Masterpiece Cakeshop in 2012 was equally expressive. In our culture it is probably true that same-sex weddings are more expressive than traditional weddings, but even heterosexual ceremonies convey a very powerful message. In fact, wedding ceremonies are unique events in that they are dedicated to expressing a celebration of the couple's union. Even the most private wedding ceremonies "speak" a message which, from start to finish, suggests the love of the couple is a beautiful and wonderful thing. For this very reason most couples send invitations to various members of their communities inviting guests to witness and partake in the celebration. Additionally, many weddings incorporate the famous tradition by which the officiant poses the question to the crowd asking if any here know of a reason why the couple should not be wed, "let him now speak or else,

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[25] *See generally Marsh v. State of Alabama*, 326 U.S. 501 (1946) (recognizing the right of businesses to control what speech is expressed on its property).

[26] *See id.*

hereafter forever hold his peace."[27] For these reasons, it is difficult to imagine an event which is more expressive than a wedding ceremony, and on the contrary to the CCA's opinion, it is very likely that a "reasonable observer" would see the art furnished by Masterpiece at Craig and Mullin's wedding celebration as profound speech.

Likewise, this Court has held, "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."[28]

C. The Colorado Court of Appeals applied the wrong test at Masterpiece's detriment.

The CCA's reference to a "reasonable observer" is at odds with this Court's ruling in *Lee v. Weisman*, 505 U.S. 577 (1992) because that case spoke only of a "reasonable dissenter" rather than a reasonable observer, and with *Capitol Square v. Pinette*, 515 U.S. 753 (1993), because that case applied the reasonable observer test only to government actions, not to private individuals or businesses.

In *Wooley v. Maynard*, 430 U.S. 705 (1977), this Court held that a New Hampshire requirement that

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[27] *See Solomized Matrimony*, traditional delivery. available at http://www.episcopalnet.org/1928bcp/Matrimony.html.

[28] *Boy Scouts of America*, 530 U.S. at 661 (quoting *Hurley*, 515 U.S. at 579).

all motor vehicles license plates bear the slogan "Live Free or Die," violated the First Amendment rights of Mr. Maynard who swore that he found the slogan "morally, ethically, religiously and politically abhorrent." Chief Justice Burger held for this Court that New Hampshire had no compelling interest that prevented Maynard from covering that portion of his license plate. It did not matter to the Court majority whether a reasonable observer would conclude from the license plate that Mr. Maynard agreed with the message. Dissenting Justices Rehnquist and White noted that atheists who use United States currency with the motto "In God We Trust" are not considered to agree with that message, but that was not persuasive to the majority. Dissenting Justices Rehnquist and White also observed at 722 that appellees were free to display their disagreement with the motto by placing on their bumper "a conspicuous bumper sticker explaining in no uncertain terms that they do not profess the motto 'Live Free or die' and that they violently disagree with the connotations of that motto." But the majority were not persuaded by that argument. Yet, in this opinion of the Colorado Court of Appeals, Masterpiece has a sufficient alternative to refusing to bake a cake to show agreement in simply placing a sign in the door that notes Masterpiece is only complying with the law. No one would think allowing the Masterpiece petitioners to place a sign by the cake stating their views of same-sex marriage would be an acceptable alternative.[29]

Similarly, in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), this

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[29] Petitioner's Pet. for Cert. Appendix at 248a.

Court overruled a previous decision *(Minersville School District v. Gobitis*, 310 U.S. 586 (1940)) and held that a West Virginia policy requiring school children to salute the flag and say the Pledge of Allegiance violated the free exercise and free speech rights of children who held religious objections to the ceremony, because it was "a compulsion of students to declare a belief." *Id.* at 631. In the same way, the CCA is attempting to compel Masterpiece to declare a belief that same-sex marriage is acceptable, or at the very least, that it is not unacceptable for a devout Christian to participate in a same-sex wedding. The CCA's opinion directly opposes the ruling in *Barnette*. Indeed, Justice Frankfurter observed in his dissent in *Barnette* at 664 that "Saluting the flag suppresses no belief, nor curbs it. Children and their parents may believe what they please, avow their belief and practice it. It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part of the of the children and of their parents to disavow, as publicly as they choose to do so, the meaning that others attach to the gesture of salute." The CCA seems to believe the same of forcing Masterpiece to bake a cake in celebration of a same-sex wedding. Yet, the fact that the children were not required to believe the message of the Pledge and were free to disavow it, did not change the fact that forcing them to say it was a First Amendment violation. The question whether others would perceive from their recital and salute that they agreed with the Pledge did not even enter the equation.

Likewise, Justice Frankfurter's further statement on 657-58 that parents can withdraw their children from the public schools, was not persuasive to the

majority, because they would then be faced with the dilemma of having to give up a substantial state benefit (the public schools) or violate their religious beliefs.

Similarly, in *Lee v. Weisman*, 505 U.S. 577 (1992), Weisman objected to prayer at a middle-school graduation for which the audience was requested to stand and maintain respectful silence. The Court majority said at 593 that this constitutes coercion, because "in our culture standing or remaining silent can signify adherence to a view or simple respect for the views of others. ... What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it." Notice a very subtle but very import distinction here. The Colorado Court of Appeals spoke of what a "reasonable observer" (31a, 33a) would understand. This Court spoke of what a "reasonable dissenter" could believe the public would understand. And certainly one who dissents on the issue of same-sex marriage could perceive in Colorado's policy a "message of exclusion" relegating him or her to the status of a second-class citizen whose partition in society is unwelcome.

The reasoning of the CCA, and that used by the Colo Sup Ct. in its denial of cert. is that a reasonable observer would not conclude from the cake that Masterpiece endorses same-sex marriage, was rejected in *Maynard* and never even considered in *Barnette*. It is therefore at odds with this Court's precedents, making this case ideal for review by the United States Supreme Court.

CONCLUSION

THEREFORE, the Colorado Court of Appeals' decision is at odds with this Court's decisions in *Barnette*, *Hurley*, *Lee*, and many more. This conflict with Supreme Court precedent makes this case ideal for the Supreme Court's review and resolution.

Respectfully submitted, this the 22nd day of August, 2016.

/s John A. Eidsmoe
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